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IN THE

Supreme Court of the United States

October Term, ~~1948~~ 1949

~~No. 888~~ 10

**AMERICAN COMMUNICATIONS ASSOCIATION, CIO,
JOSEPH P. SELLY, Etc., et al., Appellants**

v.

**CHARLES T. DOUDS, Individually and as Regional Director
of the National Labor Relations Board, Second Region**

**BRIEF FOR THE CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS AMICUS CURIAE**

ARTHUR J. GOLDBERG,
General Counsel;

FRANK DONNER,

THOMAS E. HARRIS,

Assistant General Counsel.

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of the National Labor Relations Board, Second Region**

**BRIEF FOR THE CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS AMICUS CURIAE**

The Congress of Industrial Organizations submits this brief as *amicus curiae* pursuant to Rule 27 of this Court. The written consent of all parties to the case to the filing of this brief has been filed with the Clerk.

QUESTIONS PRESENTED

Section 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, subjects a union to certain penalties and disabilities unless each of its officers has filed an affidavit disclaiming belief in or affiliation with communism. Among the sanctions are: (1) The remedies otherwise available under the Act for the redress of unfair labor practices by employers are withheld; (2) The union shop is forbidden; (3) Certain types of strikes and boycotts, otherwise legal, are prohibited; and (4) Non-complying unions are excluded from participating in Labor Board elections, which are so conducted as to favor a competing complying union.

The question presented is whether Section 9(h) is unconstitutional, for any one of the following reasons:

(1) Because it deprives unions, union officers, and mem-

bers of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom to engage in political activity, in violation of the Ninth and Tenth Amendments, of the Constitution.

(2) Because it is vague and indefinite, and imposes tests of guilt by association, in violation of the First and Fifth Amendments.

(3) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3, of the Constitution.

The two latter bases for challenging the provision's constitutionality are fully covered in the Brief for the Appellants, and, for the sake of brevity, only the first point will be covered in this brief.

INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

The Congress of Industrial Organizations is filing this brief because it considers Section 9(h) to be a grave infringement upon the civil liberties of unions, union officers, and union members. Mr. Philip Murray, the President of the CIO and of the United Steelworkers of America, and the other officers of both of those organizations, have refused to file the required affidavits. They have not refused because they are communists or because they have any sympathy for communism or any desire to retain communists as officers of CIO unions. They have refused because, as a matter of principle, they decline to yield to what they regard as a major invasion of the constitutional rights of labor to freedom of thought, speech and assembly, and of political activity.

Communism has no firmer foe than Mr. Philip Murray. The United Steelworkers of America, of which Mr. Murray is President, has no communist officers. Not only are Mr. Murray and other influential leaders of the CIO effectively combating communist influences in unions, but the CIO has given strong support to the Marshall Plan and to ECA. Thus, the CIO's objection to Section 9(h) flows not from sympathy with communism, but from a devotion to civil rights and from a belief that unless the civil rights of communists are protected, those of others will not be.

Because it has not complied with Section 9(h), the United Steelworkers of America, CIO, and its almost one million members have been subjected to or are threatened with various penalties for non-compliance, which are elaborated in Point I of the Argument. The United Steelworkers are, moreover, only one of several national or international unions, CIO, AFL and Independent, which have not complied with Section 9(h), and are similarly subject to its sanctions.

For these reasons, the Congress of Industrial Organizations has a very great interest in the question at issue in this case.

ARGUMENT

This brief is addressed solely to the proposition that Section 9(h) of the National Labor Relations Act is unconstitutional because it deprives unions, union officers, and members of unions of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom of political activity in violation of the Ninth and Tenth Amendments. There are, however, other substantial grounds for challenging the constitutionality of Section 9(h), which, for the sake of brevity, we do not argue, but which are fully covered in the Appellants' Brief.

I.

Section 9(h) Heavily Penalizes Unions Which Have Officers With Proscribed Beliefs, in Order to Force Their Expulsion.

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and drastically amended the National Labor Relations Act. Among the provisions added to the old Act by the Taft-Hartley Act is Section 9(h), which reads as follows:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there

is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports [sic] any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

The gist of this new Test Act is that union officers must fore swear certain proscribed political, or politico-economic, doctrines and associations. The beliefs and activities to be abjured are: (1) Membership in or affiliation with the Communist Party; (2) Belief in the overthrow of the government by force or by any illegal or unconstitutional methods; and (3) Membership in or support of any organization which believes in or teaches such overthrow. The required oath of disavowal will be referred to herein as the non-communist affidavit.

While compliance with Section 9(h) depends upon a union's officers, any one of whom can block compliance by refusing to execute the affidavit, the consequences of non-compliance fall directly only upon the union. These consequences are, in general, that the union loses certain rights under the Labor Relations Act, and is subjected to certain prohibitions—rights which are not taken from complying unions and prohibitions to which they are not made subject.

It is necessary to examine the exact nature of the sanctions for non-compliance, not only because it is essential to an understanding of the purpose and operation of the statute, but because of the peculiar argument made by the Board in support of the statute's validity. In the numerous cases in the lower courts in which the constitutionality of Section 9(h) has been in issue, the Board has always asserted that the only consequence of non-compliance is that benefits otherwise conferred upon unions by the Act are withheld. The Board then goes on to argue that when Congress is dispensing favors, it raises no question under the First Amendment by conferring

them upon some and denying them to others, but only a question under the due process clause of the reasonableness of the classification. This is so, the Board contends, even if the test for selecting or rejecting beneficiaries is their political or economic beliefs. The Board then supports the validity of the statute under the due process test of reasonableness, conceding that it cannot meet the clear and present danger test which is applicable to legislation restricting rights protected by the First Amendment.

Even upon the assumption that Section 9(h) is enforced only by withholding benefits, the Board's argument that the use of a political test for selecting beneficiaries does not impair freedom of thought, speech and political activity is wholly unsupportable under the decisions of this Court. That is fully demonstrated in the Appellants' Brief, pp. 32-57, and will not be gone into in this brief.¹

What we shall show is that the Board's assertion that Section 9(h) is enforced only by withholding benefits is entirely misleading. We shall demonstrate, on the contrary, that the sanctions evoked by failure to file the affidavits impose upon a non-complying union penalties so heavy as to threaten its existence, leaving it no real alternative to expulsion of the officers whose beliefs offend 9(h). It follows that the statute must be judged as if it explicitly prohibited persons of the proscribed beliefs from serving as union officers.²

¹ We wish only to add that a similar argument was made and rejected in *Thomas v. Collins*, 323 U.S. 516. In that case this Court held unconstitutional a Texas statute which required organizers to secure an identification card from a state board before soliciting persons to join unions. The state, like the government here, sought to avoid the clear and present danger test by urging that the statute did not restrict free speech but regulated business practices, so that the test of its constitutionality was only whether it had a reasonable basis. This Court rejected the state's contention, and held that the clear and present danger test applied, stating (p. 530):

* * * It is the character of the right, not of the limitation, which determines what standard governs the choice.

² The Board makes no point of the fact that union officers' beliefs are ascertained by requiring them to file affidavits, rather than in some other way. None could be made: the exaction of a test oath, is, if anything, the very method of determining belief which is most offensive to civil rights, both because of its origin and frequent use as an in-

A. Section 9(h) Heavily Penalizes Non-Complying Unions

1. *Withholding of Remedies Against Employers*—Section 9(h) directs the Board to withhold from a non-complying union the remedies otherwise available to it under the Act for the prevention and redress of unfair labor practices by employers.* As to non-complying unions, employers are once more free to use the repressive practices by which they broke unions and prevented unionization in the days before the Wagner Act was passed.

Literally, Section 9(h) only prohibits the Board from acting upon charges filed by non-complying unions, leaving it free to consider charges by individual members of such unions. However, even the Wagner Act gave the Board complete discretion, not subject to judicial review, as to whether to act on charges.* By a Taft-Hartley amendment (Section 3(d)), that discretion was transferred from the Board to the General Counsel, whose dismissal of charges is now not reviewable even by the Board.

It is the General Counsel's normal practice to entertain charges filed by individuals alleging violations of Section 8(a)(3), and presumably 8(a)(1) and (4), but not those alleging violations of 8(a)(2) and (5). However, even as to charges of the former types, the General Counsel, sometimes, if the complainant's union is not in compliance, arbitrarily refuses to issue a complaint. In such cases the ground assigned for dismissal is that the members were acting for the union, although it is the individual who is the primary victim

strument of tyranny and because of the element of self-incrimination. Cf. *Cummings v. Missouri*, 4 Wall. 277, and *Ex Parte Garland*, 4 Wall. 333.

As it passed both Houses, the bill did contemplate that the Board would determine whether union officers entertained the proscribed beliefs. It was changed in conference to avoid the administrative delay which that would have entailed. See 93 Cong. Rec. 6604. (References throughout to the Congressional Record are to the daily preliminary print.)

*The language of Section 9(h) is that "no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10," unless the required affidavits are on file with the Board.

**Marine Engineers' Beneficial Ass'n. Local No. 33 v. N.L.R.B.* (C.C.A. 2, not reported below), certiorari denied 320 U.S. 777; *White v. N.L.R.B.*, 5 Labor Cases 62,742 (Ct. App. D.C. 1941) not officially reported. And see *Jacobsen v. N.L.R.B.*, 120 F. 2d 96, 100 (C.C.A. 3).

of an unfair labor practice of this type. (See e.g., *In re Times Square Stores Corp.*, 79 N.L.R.B. No. 50).

Moreover, only the union can complain of an employer's refusal to bargain with it. Non-complying unions which have for years been the certified bargaining representatives in particular plants, are thus now deprived of all legal remedy against the employers' refusal to bargain with them. This effect of Section 9(h) is strikingly illustrated by the cases of *United Steelworkers of America, CIO v. N.L.R.B.*, No. 431, this Term, pending on petition for certiorari to the Seventh Circuit; and *United Steelworkers of America v. N.L.R.B.*, now pending decision in the Court of Appeals for the First Circuit. In each of those cases the union had for some years been the certified bargaining representative in the particular plant involved; the employer refused to bargain about certain subjects; the union filed a charge with the Board; and, after a hearing, the trial examiner issued a report recommending that the employer be ordered to bargain with the union on the issues in question. Each case stood in this posture when the Taft-Hartley Act was passed, and in each case the Board then conditioned its order upon compliance by the union with the new Section 9(h).

Employers are not forbidden to recognize or bargain with non-complying unions; but, if the employer refuses, the union has no legal remedy under the Act. The result is that the employer, and not the government, decides whether the sanction of non-recognition is to be invoked against a non-complying union. For the government to discriminate against unions on account of the political and economic beliefs of their officers is bad enough. For it to delegate such power to employers is worse.

Whether a particular employer will decide to withdraw recognition from a non-complying union will depend on several considerations. One is whether he can effectively alienate the support of the union members and others in the community from the union on the ground that the union leaders hold proscribed beliefs. Attacks by employers upon unions and unionism for "patriotic" reasons are, of course, not a novel phenomenon in the field of labor relations. The recent long-

shoremen's strike on the west coast took place because the employers were induced by 9(h) to believe that they could successfully refuse to deal with the existing leadership of the union. See *Fortune*, January 1949, p. 153. A second factor which will enter into the employer's consideration is whether the economic strength of the union is so great as to make it impracticable for him to withdraw recognition. For while a union has no legal remedy, it still has the right to strike or invoke other economic sanctions not prohibited by the Taft-Hartley Act. (In the west coast strike, the employers underestimated the union's economic strength, and ended by signing a contract with the old union leaders.)

Yet a third factor which may induce an employer to withdraw recognition from a non-complying union is the presence in the field of a competing union which is more acceptable to the employer. As explained below, the Board conducts its representation elections in such a fashion as to virtually insure the victory of a complying union. Thus, an employer can legally use non-compliance with Section 9(h) indirectly to influence its employees to reject the non-complying union and select its competitor. That, of course, is just what an employer is forbidden to do directly by Section 8(a)(2).

2. Outlawing of Union Shop.—The consequences of non-compliance with 9(h) go far beyond the loss of legal remedies under the Act. Unions which are not in compliance with Section 9(h) are prohibited from entering into a union shop contract with an employer. That is effected in this way: the Act, by Sections 7, 8(a)(3), and 8(b)(1), prohibits the closed shop and permits the union shop only after the union has won a special type of election provided for in Section 9(e)(1) of the Act. And Section 9(h) provides that no such election shall be conducted at the behest of a non-complying union.

Not only the union shop, but the closed shop, was legal long before the Wagner Act. Indeed, this provision puts non-complying unions under a restraint to which unions were never before subjected by federal legislation. A closed or union shop is the goal of every union. To prohibit the union shop to non-complying unions, while permitting it to complying unions, is to strike the former a deadly blow.

3. *Non-Complying Unions Excluded from Board Elections.*—The exclusion of non-complying unions from participation in Board elections, and the holding of these elections under rules which virtually insure the success of competing complying unions, are discussed in Appellants' Brief, pp. 13-17. Here we wish to add only the most recent example of how the Board goes about permitting employees to designate bargaining "representatives of their own choosing" (Section 7).

In the proceeding referred to (*In re Woodmark Industries, Inc.*, 80 N.L.R.B., No. 171) the Board certified a complying union which received only 15 votes out of a total of 43 cast. Of the remaining votes, 11 were for no union and 17 were write-ins for a non-complying union which had theretofore been the bargaining representative. The Board voided the 17 write-in votes and certified the complying union, which was the only union on the official ballot, on the ground that it won a majority of the 26 valid ballots cast.

The write-in votes were not even given the status of votes against the complying union. If they were, the Board declared, the non-complying union would reap "an indirect benefit . . . [from a Board election] as the result of having demonstrated its strength in such election and having secured the defeat of a complying labor organization properly participating therein."

This "election" strikingly resembles those held in the "People's Democracies" of eastern Europe. Joyfully accepting the mandate of the 80th Congress to stamp out political unorthodoxy in unions, the Board reduces to a mockery the constitutional rights of workers to form and join labor organizations of their own choosing.*

Theoretically, it is open to a non-complying union, faced with such an election, to persuade the employees to reject its complying competitor by voting for no union, and then, by using its economic strength, to induce the employer to bargain with it. Practically, such a course is most difficult. In

* A more euphemistic description of what happens in these Labor Board elections is that of the Congressional Committee on Labor-Management Relations, in its Report issued December 31, 1948 (p. 35):

" . . . unions whose officers have complied had marked success in NLRB representation elections whereby they have supplanted the noncomplying union."

an election in which the ballot offers only the choice between the complying union and no union, the employees usually will choose the complying union, rather than vote for no union at all, even though they would choose the non-complying union if they were given that choice. The choice between a complying union and no union is not a free choice, if what the employees want is to be represented by a non-complying union.

This is not a withholding of statutory benefits: it is a direct interference with the constitutional right of self-organization. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34; *Thomas v. Collins* 323 U. S. 516, 539. Such interference is not limited to the holding of rigged elections. It is implemented also, in the statutory provisions to which we now come, by penalizing non-complying unions and protecting complying unions.

4. *Certain Strikes or Boycotts by Non-Complying Unions Prohibited*—In three types of situations the Act makes illegal and creates novel and drastic sanctions against strikes or boycotts by non-complying unions while permitting them by complying unions. These provisions operate not only for the protection of employers but of complying unions which have won "elections" of the sort just described.

Section 8(b)(4)(B) makes it an unfair labor practice for a union to engage in a strike or boycott against one employer for the purpose of requiring another employer to recognize a union, unless that union has been certified as the bargaining representative under the Act. Since a non-complying union cannot be certified, the effect of Section 8(b)(4)(B) is to deny to every non-complying union the aid, by strike or boycott, of other labor organizations, in seeking bargaining rights. Prior to the enactment of Section 9(h), and prior to the Wagner Act as well, labor organizations supported each other in striving for recognition. Now the Act denies such support to non-complying unions, while permitting it to complying certified unions.

Section 8(b)(4)(C) makes it an unfair practice for a union to strike to compel recognition if another union has been certified. This provision, obviously, is for the protection of

complying unions which have won "elections," in which competing non-complying unions have been excluded from the ballot. The non-complying union, having been barred from the election, is also denied the use of its economic weapon—a strike. And the complying union, having had the benefit of a one-ticket election, is given an additional protection which it would not need if it were actually the free choice of the employees. Here, again, non-complying unions are prohibited from engaging in conduct which was legal before Taft-Hartley.

Section 8(b)(4)(D) prohibits a union from striking to secure the assignment of particular work to its members, unless it has been certified as the representative for employees performing such work. Once again, activities which were legal in the absence of statute, and which continue to be legal for certified complying unions, are outlawed when undertaken by organizations which have not complied with Section 9(h).

The summary injunction procedure created by Section 10(1) of the Act (described in Appellants' Brief at p. 16) may be invoked against strikes or boycotts prohibited by Section 8(b)(4)(B) and (C); and such strikes and boycotts, and those prohibited by 8(b)(4)(D) as well, are also declared to be illegal for the purpose of suits for damages by employers.*

The cumulative effect of all of these provisions upon a non-complying union is obviously very great. As stated by Judge Prettyman, dissenting, in *N.M.U. v. Herzog*, 78 F. Supp. 146, 179 (D.C., D.C., 1948), it may be doubted whether a non-complying union can permanently survive. At the least, unions are placed under exceedingly strong compulsion to comply with Section 9(h), and to expel union officers who cannot or will not sign the required affidavit. That was precisely the purpose of Congress in enacting 9(h).

B. The Purpose of Congress Was to Force Unions to Expel Officers Having the Proscribed Beliefs

1. *Legislative History*—Section 9(h) was enacted specifically "to prevent Communists from being officers of labor

*Section 303(a) repeats the prohibitions of Section 8(b)(4); and Section 303(b) provides that anyone injured by any violation of (a) may sue in any federal district court and recover the damages sustained.

unions." (Senator Ball, 93 Cong. Rec. A3233). Congress did not conceal its purpose: numerous assertions during Congressional debate like that just quoted are assembled in Appellants' Brief, pp. 41-44. Further demonstration of the point seems unnecessary, and the following discussion seeks only to clarify the general outline of the legislative history.

Section 9(h) originated as Section 9(f) (6) of the House bill. As reported out by the House Committee, it contained no requirement for filing affidavits, but provided that the Board shall not certify a union any of whose officers is a member of the Communist Party, etc.⁷ The House bill also contained a provision, which was Section 8(c) (6), prohibiting unions from expelling members except upon certain specified grounds, one of which, subsection (D), was being a member of the Communist Party, etc.

Referring to these two provisions, the House Committee Report (No. 245, 80th Cong., 1st Sess., pp. 38-39) stated:

Section 9(f) (6).—At least 11 great national unions and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions. By the bill of rights set forth in section 8(c), the bill helps them to rid themselves of communistic control. Section 9(f) (6) makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and temporize with it, to clear house or risk loss of rights under the new act.

• • • Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil. They should be weeded out of the labor movement.

⁷ Section 9(f) (6) was amended in the House to apply to any officer who "is or ever has been" a member of the Communist Party, etc., the amendment being adopted by a vote of 153 to 10. It was later dropped in conference.

The "ever has been" test that was included in the House Bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary. [Report No. 510, 80th Cong., 1st Sess., p. 49.]

It was presumably because of the presence of Section 8(c) (6) (D) in the House bill that it was several times asserted during the House debates (see Appellants' Brief, pp. 41-42) that the bill would "drive Communists out of our labor organizations" (Congressman Hartley, 93 Cong. Rec. 3705), and not merely that the bill would drive out labor officers who were Communists.* Section 8(c) (6) was, however, dropped in conference, its place being taken by a provision in Section 8(a) (3) that even under a union shop contract an employer shall not discharge an employee who is expelled from a union for any reason other than non-payment of dues. The subsequent discussion concerning what had become Section 9(h) (see Appellants' Brief, pp. 42-44) was, hence, more sharply focused, both in the Senate and in the House, and was explicit that it was "The provision to keep communists out of leadership of unions" (Representative Engel, 93 Cong. Rec. A2803.)

2. *Joint Committee Report*—Title IV of the Taft-Hartley Act created a Joint Committee on Labor-Management Relations, for the purpose of studying labor-management relations, including the operation of the Act. This Committee has found that Section 9(h) has been quite effective in achieving its purpose of forcing unions to remove communistic officers. Its report dated March 15, 1948, stated (Senate Report No. 986, 80th Cong., 2nd Sess., pp. 10-11):

Officers of a large majority of labor organizations have complied with the filing requirements. In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Recent newspaper accounts report action by the International Lady Garment Workers Union (AFL), the United Furniture

* An additional statement to the latter effect is that of Representative Bell (93 Cong. Rec. 3704):

Mr. Chairman, this is a correcting amendment to paragraph 6 on page 33 which provides that any person who is a Communist or belongs to certain Communist organizations shall not be an officer in a union. I am in thorough accord with the purpose of that paragraph which is to protect the future of this country against the impending danger of having Communists in control of our great American labor organizations.

This bill was regularly spoken of as barring or excluding Communists from serving as officers of unions. See e.g. statements of Representative Mundt, 93 Cong. Rec. 3706-7; Congressman Crawford, 93 Cong. Rec. 3706.

Workers (CIO), and the United Shoe Workers (CIO), to cleanse their organizations of officers who are not willing, or are not able, to file the necessary affidavits.

A few large labor organizations, such as the United Electrical Workers of America (CIO), the United Steelworkers of America (CIO), and the United Mine Workers of America, independent, have announced it as their policy that they would not comply with the filing requirements of the act. Some evidence of membership dissatisfaction with the policy of boycotting the processes of the National Labor Relations Board has been noted. For example, a New York local of the United Electrical Workers, Local 1237, is reported to have withdrawn and formed an independent mechanical and electrical workers' union in order that it might have the protection afforded by the new act. Also, in St. Louis, a large segment of the Retail, Wholesale and Department Store Employees Union (CIO), seceded from that union to form a new independent union and took quick steps to comply with the act. In Pittsburgh, the State liquor store employees broke away from the United Public Workers (CIO) to form an unaffiliated union. Other unions which have not yet complied are bringing themselves within the protection of the act. Recently the CIO's union of Marine and Shipbuilding Workers, with an estimated membership of more than 100,000, voted to comply with the affidavit and registration requirements.

The committee hopes that within the very near future all labor organizations in the United States will be persuaded of the benefits which the procedures under the Taft-Hartley Act hold out for them and will take the necessary steps to avail themselves of the benefits and peaceful procedures offered by the law.

The Joint Committee's final report, issued December 31, 1948, likewise states (p. 3):

Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947. There are still unions, in a steadily declining number, however, whose officials have not filed non-Communist affidavits in compliance with the law. A number of unions have fully met this provision with the ouster of officials who have failed to meet this statutory requirement.

Again (p. 35):

In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Refusal by incumbent officers to make the affidavit has been an issue in a number of union elections which resulted in such officers being denied reelection.

II

By Penalizing Unions for Having Officers With Proscribed Beliefs, Section 9(h) Impairs Basic Civil Rights Protected by the Constitution

Freedom of political thought and action is what separates democracy from despotism, or, to use a term currently more popular, totalitarianism. Any system of free government must recognize the right of people to determine for themselves what they believe in—and to act on their beliefs. If political freedom is to be preserved in this country, these rights must be zealously safeguarded. Fear of a foreign police state must not be the excuse for degenerating into one here. It is not enough to hate communism, as did the Congressmen who enacted Section 9(h). We must love democracy as well, understanding that its essence is the right of the people fully to choose among competing political and economic beliefs.

The question before the Court is the constitutionality of a statute which is designed to force unions to remove officers who do not forswear certain proscribed political and economic beliefs, and which subjects unions to various onerous penalties unless they do remove such officers. Such a statute, we submit, infringes the most fundamental civil rights of unions, union members, and union officers; and can be sustained only if the criteria for testing the validity of legislation invading freedoms normally protected by the First Amendment are met.

A. Section 9(h) Restricts Unions and Members of Unions in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity

Under the political systems which have developed in the democratic countries, effective action in the political field means group action—action through political parties, labor

unions, and other associations.' The right to form, to solicit others to join, and to act through such organizations is protected by the Bill of Rights. It is the form which the freedom of assembly of earlier times takes in a more populous country and a more complicated society. Such groups often afford the only effective vehicle for the exercise of free speech.

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate

*The unique contributions of voluntary associations, other than political parties, to the formation and strengthening of democratic processes and institutions in the United States has been the subject of frequent comment. On the significance of groups in American life, see Schlesinger, *The Rise of the City—1878-1898* (1933), pp. 409-410; Bryce, *The American Commonwealth* (1910), p. 294; de Tocqueville, *Democracy in America* (1900), pp. 114-118. On the vital role played by voluntary groups in the founding of the American republic, see Van Tyne, *The Causes of the War of Independence* (1922), pp. 373, 374-376, 427-428 (Committees of Correspondence).

On the contributions of groups and voluntary associations in particular fields, see

Race Relations:

Hobbs, *The Antislavery Impulse* (1933); McMaster, *History of the People of the United States* (1895), Vol. II, p. 21; Myrdal, *American Dilemma* (1944), Vol. II, pp. 810-857;

Peace Movements:

Curti, *American Peace Crusade* (1929); Schlesinger, *The Rise of the City* (1933), pp. 365-366;

Economic Relations:

Hinds, *American Communities and Cooperative Colonies* (1908); Noyes, *History of American Socialisms* (1870); Adams, ed., *History of Cooperation in the United States*, Vol. VI, Johns Hopkins Studies in Historical and Political Science (1888);

Women's Rights:

Schlesinger, *New Viewpoints in American History* (1926), pp. 126-160;

Public Schools and Adult Education:

Curti, *The Growth of American Thought* (1943), pp. 349-352, 596-597; Post, *Popular Free Thought in America* (1943), p. 87;

Land Reform and Colonization:

Zahler, *Eastern Workingmen and National Land Policy* (1941); McMaster, *op. cit.*, Vol. VI, p. 109;

Agricultural Associations:

Oberholtzer, *A History of the United States Since the Civil War* (1926), Vol. III, pp. 102-109; Hicks, *The Populist Revolt* (1931);

Humanitarian and Related Movements:

Fish, *Rise of the Common Man* (1927), pp. 259-260; Stewart, *The National Civil Service Reform League* (1929); Nevins, *The Emergence of Modern America* (1927), p. 334; McCrea, *The Humane Movement* (1910).

rights, . . . and therefore are united in the First Article's assurance. [*Thomas v. Collins*, 323 U.S. 516, 530].

For workers, political expression is, to an ever increasing extent, through their unions. Just as individual workingmen must act in concert if they are to further their economic interests, so they must express their political views through the spokesmen for their group if they are to exercise their political freedom effectively. As one writer has put it:

Labor has always been in politics.

It is difficult to conceive of any functioning labor organization which does not take part in politics. For the leaders of labor, politics was, and is, the other side of the trade-union coin.

Every labor organization is, in principle, dedicated to the protection of the rights of its members and to the improvement of their conditions. If these objectives are to be attained, labor must ask for legislation of many kinds. Whether a union succeeds or fails in getting its demands depends entirely upon whether the legislators are for labor or against labor. In turn, very naturally, labor supports those legislators friendly to labor, and repudiates those who are anti-labor.

It has always been so.

As far back as 1886, Samuel Gompers said, "We regard with pleasure the recent political action of organized workingmen of this country, and by which they have demonstrated that they are determined to exhibit their political power." Joseph Gaer, *The First Round*, (1944), p. 49."

"The best available account of the forces which have stimulated labor's political activities is Taft, *Labor's Changing Political Line*, 43 Journal of Pol. Ec. 634 (1937).

The following texts document the historic role of labor in American political life:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33-46, 54-61, 80-85, 103-112, 165-171; Bimba, *The History of the American Working Class* (1927), pp. 84-89, 204-208, 323-330; Carroll, *Labor and Politics* (1923), pp. 27-54, 80-138; Childs, *Labor and Capital in National Politics* (1930); Commons and Associates, *History of Labor in the United States*, Vols. I and II (1918), Vol. I, pp. 169-335, 369, 434-471, 522, 535, 548-559; Vol. II, pp. 85-109, 124-130, 138-146, 153-155, 168-171, 240-251, 324, 341-342, 351-353, 461-470, 488-493; Daugherty, *Labor Problems in American Industry* (1933), pp. 622-629; Foner, *Labor Movement in the United States* (1947), pp. 104-105, 130-134, 140, 149-166, 210-217, 245-248, 262-263, 334-336, 357-359, 372-373, 423-429, 475; Harris, *American Labor* (1938), pp. 33-55, 65-69; Hoxie, *Trade Unionism in the United States* (1917), pp. 78-102; Lorwin, *The American Federa-*

With the increased participation of government in our economic life, workers are forced to go into politics, through their unions, in order to preserve their economic security and standard of living. If an individual is helpless in dealing with his employer, then how can it be said that he is more able to deal with the powerful employer-dominated political interests which, unless restrained, can decisively fix or alter the terms and conditions under which he must live? In sheer self-protection he must associate with others in order to preserve those political values which enforce and promote his economic interests. He must organize politically in order to defend against political attack the gains achieved through his economic strength. He must organize politically in order to meet the organized political attack of other interests in our national life. And he must organize politically in order to safeguard and promote his right to form and join unions and his right to bargain collectively and to strike.¹¹

Leaders of modern labor organizations are necessarily participants in the political life of their local community, of their State, and of the Nation. They express the political views of their organizations. They consult with and are consulted by other organizations and individuals. They lend support to joint projects and they ally themselves with others to induce the passage of legislation and to achieve other political goals. They participate in political planning and election campaigns. They take part in government administration and in the shaping of government policy, as in the case of the tripartite Na-

tion of Labor (1933), pp. 88-93, 123-126, 221-226, 351, 397-425; Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54-56, 57n, 62, 67, 71, 81, 91, 108-111, 118, 123-129, 141, 143, 149, 178, 181-188, 232-238, 303-305, 311, 313, 317-320, 348-349, 600, 669, 829, 890; Perlman, *A History of Trade Unionism in the United States* (1929), pp. 146-160, 285-294; Perlman and Taft, *History of Labor in the United States, 1896-1932* (1935), pp. 150-166, 525-537; Schlesinger, *The Age of Jackson* (1945), pp. 132-158, 180-185; Walsh, C. I. O., *Industrial Unionism in Action* (1937), pp. 248-271; Ware, *The Labor Movement in the United States, 1860-1895* (1929), pp. 350-370; Ware, *The Industrial Worker, 1870-1890* (1924), pp. 154-162.

One of the most powerful factors which brought labor into political life was the evil of "Government by Injunction." Lorwin, *The American Federation of Labor* (1933), pp. 88, 90.

tional War Labor Board and National Wage Stabilization Board, in which labor leaders represented the Labor point of view. And they exert an influence in political affairs commensurate with the size of the labor organizations which they head.

Members of labor organizations, aware of the important role of their union in political life, are influenced in their choice of union officers by the political views and beliefs of the candidates. For workers, freedom of thought, speech and assembly and of political activity means freedom of work in unions and through leadership of their own choosing. As established by *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34—

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.

Section 9(h) penalizes unions, and through them their members, for selecting as officers persons having the political beliefs which Section 9(h) proscribes. To tell union members that they cannot have as officers persons of a particular political persuasion restricts their freedom of political activity through the very instrumentality—the union—which is peculiarly adapted to serving as a vehicle for worker expression, both in the political and, if they can be separated, economic fields.

A more direct interference with the freedom of union members—freedom of speech, of assembly, and to engage in political activity, is hard to imagine. Let us take, for example, the case of a union, the majority of whose membership is communist. Section 9(h) prohibits these workers, on pain of onerous penalties to their union, from selecting as their officers persons adhering to the same political party as themselves. Union members are entitled to choose officers whose political beliefs are acceptable to them—not to the Congress. That right cannot be taken away without raising the gravest constitutional issues.

B. Section 9(h) Restricts Union Officers in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity

The plain purpose and effect of Section 9(h) is to prevent persons of designated political and economic views from serving as union officers. Thus the statute strikes directly at the freedom of belief, speech, and political activity of union officers. And persons who have exercised these constitutionally protected freedoms in a fashion unacceptable to Congress are, in consequence of their unorthodoxy, denied yet another right to the expression and effectuation of their beliefs—the right, if the membership agrees, to be an officer of a labor union. Thus they are excluded from the very positions in which they might give effective expression to their views—and that, of course, is why they are excluded.

In view of this gross infringement of the civil rights of union officers, it is with a feeling of apology that we point out that they also lose their jobs. This consequence of Section 9(h) is, however, particularly relevant to the Board's argument that the only sanction of Section 9(h) is to withhold from unions benefits otherwise made available under the statute. As to unions this argument is factually misleading and legally irrelevant; as to union officers it is preposterous. They are not denied a benefit: their unions are put under pressure to fire them. Cf. *Truax v. Raich*, 239 U. S. 33.

III

Civil Rights May Be Limited Only When Their Exercise Creates Clear and Present Danger to a Paramount Public Interest

In the language used by Mr. Justice Holmes in first enunciating the now famous test, freedom of speech can be restricted only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils the Congress has a right to prevent." *Schenck v. United States*, 249 U. S. 47, 52. He spoke in 1919, at the outset of the red scare which followed the first World War. As national hysteria thereafter mounted, the Court, notwithstanding strong dissents by Jus-

tice Holmes and Justice Brandeis, seems to have wavered in its adherence to the clear and present danger test. *Schaefer v. United States*, 251 U. S. 466; *Gittlow v. New York*, 268 U. S. 652.

In more recent years, however, the Court has returned to that test, and has stressed with ever increasing firmness the strong showing of necessity which must be made to uphold legislation which restricts freedom of belief or thought or speech. Thus in *Bridges v. California*, 314 U. S. 252, it said (p. 263):

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

And still more recently, in *Thomas v. Collins*, 323 U. S. 516, 530:

Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Now the country is again in a period of anti-red hysteria. In a mood far from dispassionate, and with scarcely a voice raised on behalf of ancient freedoms, the 80th Congress enacted Section 9(h)—avowedly for the purpose of driving out union leaders whose beliefs are too radical to be acceptable to Congress.

Surely so gross an invasion of fundamental civil rights is to be sustained only upon the clearest showing of necessity. That is not to say that the Congress is powerless to protect the country against real dangers. Even the gravest invasions of civil rights have been sustained, as in the Japanese removal cases, when thought necessary to protect the nation against imminent peril. But the danger must be real and the restriction on freedom necessary.

IV

Section 9(h) Cannot Be Sustained Under the Clear and Present Danger Test

These are times of international strain acerbated by the coincidence of national and ideological rivalries. If the activities of the Communist Party constitute a clear and present danger

to the continued existence of the American constitutional system, threatening to overturn it by force or violence, or by treasonable adherence to a foreign power in time of war, the Communist Party can constitutionally be outlawed.

Thus far, however, the judgment both of the country and of the Congress has been that so extreme a step is not warranted. Even the reactionary 80th Congress failed, after long consideration, to pass the Mundt-Nixon bill, and that bill would have stopped considerably short of outlawing the Communist Party. And even in the heat of the political campaigning last summer, the candidates of both major parties agreed that no such extreme step as outlawing the Communist Party should be taken.

The statute now under consideration, is, of course, narrower. It does not outlaw the Communist Party but seeks only to exclude members of that party and others entertaining certain described beliefs from serving as officers of labor unions. But that does not eliminate the need for careful and dispassionate scrutiny of the circumstances which were thought to justify the legislation.

Accordingly, we turn to consideration of the factual showing which the Board offers as justifying Section 9(h)—not as an invasion of rights normally protected by the First Amendment—but as a reasonable discrimination in singling out beneficiaries for government favors.¹²

The legislative history of the Taft-Hartley Act shows that in so far as Congress was aiming at any specific supposed evil in enacting 9(h), that evil was political strikes. Union officers who are communists, might, Congress thought, cause political strikes.

In arriving at this conclusion, Congress appears to have relied exclusively upon the testimony of Mr. Louis Budenz,

¹² As Judge Rifkind, dissenting below in the present case, pointed out, "indeed, on the argument the defendant disavowed the presence of clear and present danger." 79 F. Supp. 565. Judge Major, in his dissent (*U.S.A. v. N.L.R.B.*, 170 F. 2d 247, 257, C.C.A. 7) similarly noted:

The Board in effect concedes that the section cannot be justified by what the Supreme Court has characterized as the "clear and present danger rule."

Much the same concession seems to have been made in *N.M.U. v. Herzog*. See 78 F. Supp. 146, 147, dissenting opinion of Prettyman, J.

a well-known former Communist who testified before the House Committee which was considering the Taft-Hartley Act. He stated that a strike which occurred at the Allis-Chalmers plant, in Milwaukee, early in 1941, was precipitated by communist officers of the local, not to improve the economic position of the union, but on the instructions of the leaders of the American Communist Party, in order to hinder aid to Britain. And Budenz testified similarly with respect to a strike at the North American Aviation Company during the same period.

That was the only testimony specifically dealing with political strikes which was before the Congressional committee which considered the Taft-Hartley Act.¹² Two strikes, assertedly for the purpose of interfering with aid to Britain, and at a time before the United States entered the war. At a time indeed, when opposition to aid to Britain was, if shortsighted, entirely legal.

Such opposition was not confined to communist labor leaders—it was likewise engaged in by Representatives, Senators, and even some industrialists. It will surely be remembered that a large middle western automobile manufacturer refused an order from Britain for airplane engines, because, it was rumored, of his political viewpoint. Yet that, if true, would hardly be thought to render constitutional a statute designed to exclude Republicans or isolationists from operating industrial plants.

In addition to this specific testimony about two strikes which were assertedly called for political reasons, the hearings on the Taft-Hartley Act and the debates, particularly in the

¹² In outlining the bill to the House, Congressman Hartley's explanation with respect to Section 9(f)(6)—the predecessor of 9(h)—was as follows (93 Cong. Rec. 3533):

It prohibits certification by the Board of labor organizations having Communist or subversive officers. If anyone doubts the need of that in the bill all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order.

Representative Kersten in supporting Section 9(f)(6) on the floor of the House, also used the Allis-Chalmers strike as his only specific justification for the provision. He rehashed Budenz' testimony as to the strike at considerable length. 93 Cong. Rec. 3577-8.

House of Representatives, were replete with vague but violent denunciations of communists, subversives, fellow travelers, party-liners, front organizations, etc., etc. These denunciations did not relate only to Section 9(h) or its predecessor, but were sprinkled throughout the entire discussion of the Act. The House debates are also marked by vitriolic hostility to unions. A reading of this legislative history suggests that Congress was really motivated by general hostility to labor unions and to communism, and in enacting Section 9(h) sought to strike at their point of supposed conjunction. See, for example, the statements by Representatives Smith (93 Cong. Rec. 3473-4), Hoffman (*id.* 3538), Crawford (*id.* 3706). Political strikes were not mentioned in the Senate and occupied no very important place in the House discussion. The Board's argument that Section 9(h) was enacted to meet the danger of such strikes is thus largely an improvisation, devised after the enactment of the statute in the subsequent attempt to justify it.

General denunciations of communism by prominent men are easy to find. We do not disagree with them. Indeed, Mr. Philip Murray, the President of the CIO, has not only denounced communism frequently, but has effectively fought and is fighting the influence of communists in labor organizations.

But these opinions of communists and communism are not a basis for holding that the national security, or industrial peace, are gravely threatened by communist union officers. As stated in *Bridges v. California*, 314 U. S. 252, 263:

• • • even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

In addition to the Budenz testimony, which was before Congress, the Labor Board in the lower courts relied upon additional material culled from such diverse sources as reports of the House Committee on Un-American Activities and biographies and other writings of labor leaders. From these last the Board has quoted criticisms of the conduct of communist union officers in calling, or deciding not to call, strikes for reasons

other than achievement of immediate trade union objectives. Several of these examples are of communist union leaders who assertedly refused to call strikes during the war, because, although it would have been advantageous to do so from a strictly trade union standpoint, it would have interfered with war production to the detriment of our then ally, Russia.

The Board has also quoted general statements by Congressmen and others to the effect that communist officers of unions have political, as well as economic objectives. That is, of course, equally true of union leaders who are Democrats or Republicans.

These various materials, as the Board has evidently recognized, fall far short of the showing necessary to sustain a grave invasion of freedom of speech, thought, and political activity. The most that they show, or tend to show, is that communist labor leaders have sometimes called strikes—or decided not to call them—in aid of objectives of the Communist Party other than advancement of the immediate economic interests of the union. And that is all that the materials do show.

They do not show, and Congress did not find (1) that political strikes are a clear and present danger to the security of the nation, or (2) that political strikes threaten widespread, or even substantial, industrial unrest. Absent such a showing, there is no basis for sustaining, under the "clear and present danger" rule, the heavy restraints laid by Section 9(h) upon traditionally protected freedoms.

There is, regrettably, no indication that Congress was even aware that in enacting 9(h) it was trenching upon constitutionally protected freedoms. Hence the provision was never considered there upon the basis of whether some grave evil existed which could be cured only at the cost of some impairment of freedom of thought, speech, assembly and political activity. Had Congress considered the issue in those terms, had it found that some substantial and immediate danger could be met only by restraining normally protected freedoms, a very different question would be presented to this Court.

But Congress proceeded in no such fashion. The House purportedly was disturbed about political strikes—though the last one cited to it had occurred in 1941. Political strikes, as

far as we have found, were not even mentioned in the Senate. That body seems to have adopted 9(h)—after only the most perfunctory consideration"—simply because it wanted to weaken the power of adherents of a party which it detested and distrusted. That these people might have constitutional rights was not so much as mentioned.

The Board likewise, in its defense of 9(h), has found no factual justification for impairing normally protected civil rights, but has groped for some sleight of hand argument by which to avoid consideration on the merits.

In this context, the issue before the Court is not a difficult one. It has simply no basis for sustaining 9(h): neither Congress nor the Board have supplied one. If it should hereafter appear that some major national interest is indeed gravely imperiled by the activities—not the beliefs—of communist labor leaders, it will always be open to Congress to enact, after adequate consideration, a measure genuinely designed to cope with the evil. And such a statute would present a question wholly different from that at issue here.

Even if political strikes were a grave threat to national security or industrial peace, a statute like 9(h) could not be sustained. For the proper remedy would be to prohibit political strikes: not gratuitously to flout the guarantees of the First Amendment by barring members of a particular political party from serving as union officers. That union officers who are members of that party might sometimes resort to political strikes would not justify their expulsion from union office. For the supposed evil could be cured by a narrower remedy not involving political discrimination: that is, by forbidding political strikes.

Statutes restrictive of civil rights protected by the Constitution are upheld, if at all, only if they are "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill v. Alabama*, 310 U. S. 88, 105. But Section 9(h) does not limit itself to the claimed danger—political strikes. The Taft-Hartley Act invalidates strikes for several purposes

¹⁴ The provision was introduced on the floor of the Senate as an amendment, and was passed after only cursory discussion. See 93 Cong. Rec. 5095.

by unions not complying with 9(h), which are legal for complying unions. See *supra* pp. 10-11. But political strikes are not forbidden, even by non-complying unions.

CONCLUSION

For the reasons stated, it is submitted that Section 9(h) should be held unconstitutional.

Respectfully submitted,

ARTHUR J. GOLDBERG

General Counsel

FRANK DONNER

THOMAS E. HARRIS

Assistant General Counsel